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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 121

PAUL EGAN,

Petitioner,

vs.

CITY OF AURORA, a municipality under the laws of the State of Illinois, LEO BOUCON, WILLIAM G. KONRAD, H. A. WYETH, SR., WILLIAM B. ROBERTSON, DONALD CURRAN, HERSHELL STOVER, LeROY STRAUD, ANTHONY RUKAS, JOHN (JACK) PFEFFER, RAY SCHUHOW, JOHN DAY and CHARLES DARLING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

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PAUL EGAN,

Petitioner,

—*vs.*—

CITY OF AURORA, a municipality under the laws of the State of Illinois, LEO BOUCON, WILLIAM G. KONRAD, H. A. WYETH, SR., WILLIAM B. ROBERTSON, DONALD CURRAN, HERSHELL STOVER, L. ROY STRAUD, ANTHONY RUKAS, JOHN (JACK) PFIEFER, RAY SCHUHOW, JOHN DAY and CHARLES DARLING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Paul Egan, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Seventh Circuit, in this case entered March 4, 1960.

CITATIONS OF OPINIONS BELOW.

The opinion of the United States Court of Appeals, Seventh Circuit, is in 275 F. 2d 377. It appears in the Appendix to this Petition as Exhibit A.

The opinion of the United States District Court, Northern District of Illinois, Eastern Division, the trial court, is in 174 F. Supp. 794. It also appears in the Appendix to this Petition as Exhibit B.

JURISDICTION OF THIS COURT.

Judgment.

The judgment of the United States Court of Appeals, Seventh Circuit, was entered March 4, 1960. It appears in the Appendix to this petition as Exhibit C.

In Respect of a Petition for Rehearing.

No Petition for Rehearing was filed in this case.

Statutory Provisions Believed to Confer Jurisdiction in this Court.

The statutory provisions believed to confer jurisdiction on this Court are:

(a) U.S.C.A. Title 28 §1254 (1)

(b) U.S.C.A. Title 42 §1984

QUESTIONS PRESENTED FOR REVIEW.

1. Does the fact that a Mayor of a state municipality for the preservation of what he conceives to be his official status afford other officials and officers of such municipality a legal excuse for abridgment of his right of freedom of speech and assembly under the Fourteenth Amendment and U.S.C.A. Title 42 §1983 and §1985?

(2) Whether petitioner's right as a mayor of a city to freedom of speech derives only from the laws of a state or whether such right derives also from the Fourteenth Amendment of the Constitution of the United States.

(3) Whether a local controversy between officials and officers of a state municipality is the kind of controversy which may be brought in the federal courts under the Civil Rights Acts, particularly U.S.C.A. Title 42 §1983 and §1985.

(4) Whether federal jurisdiction is to be exerted only in such exceptional cases of great urgency as necessitates action to prevent irreparable injuries under the Civil Rights Acts.

(5) Whether police officers such as municipal policemen and sheriffs and other state officers are immune from liability under the Civil Rights Acts, particularly U.S.C.A. Title 42 §1983 and §1985.

(6) Does the fact that the petitioner has remedies in state courts cut off his rights to his action under the Civil Rights Acts?

(7) Whether the presence of state remedies precludes actions under the Civil Rights Acts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions involved in this case are

(a) The Fourteenth Amendment of the Constitution of the United States. It is set forth in the Appendix to this Petition, so far as is pertinent here, as Exhibit D.

(b) The First Amendment to the Constitution of the United States, so far as is pertinent here, is set forth in the Appendix to this Petition as Exhibit E.

(c) Statutes involved here:

U.S.C.A. Title 42 §1983 and §1985 so far as is pertinent here, is shown in Appendix to this Petition as Exhibit F.

(d) The criminal counterpart of U.S.C.A. Title 42 §1983 is set forth in the Appendix to this Petition as Exhibit G.

STATEMENT OF THE CASE.

Note: In order to conserve the time of this Court we abandon all questions of pleading which concern questions arising from respondents' motion to dismiss and which we believe valid and adopt the statement of the Court of Appeals, Seventh Circuit in this case. In it, the respondents are called "defendants" and petitioner is called "plaintiff". This statement follows:

Plaintiff is the Mayor of the City of Aurora, Illinois. He brought this suit charging violation of the Federal Civil Rights Statutes, Title 42 U.S.C.A. §§ 1983 and 1985, and claims damages in the amount of $5,000,000.00.

The complaint alleges that plaintiff, as Mayor, was conducting a public meeting before a group in excess of two hundred people in the Council Chambers in the City of Aurora, when defendant Donald Curran, purporting to be acting as Chief of Police of the City of Aurora, and defendants Stover, Straud, Rukas, Pfiefer, Schuhow and Day, all purporting to be police officers of the City of Aurora, without probable cause, arrested plaintiff under color of an Illinois breach-of-the-peace statute, and incarcerated him in the city jail for a period of more than four hours. Plaintiff alleges such action was the result of a conspiracy between the above-named defendants and defendants Boucon, Konrad, Wyeth and Robertson, acting as individuals and as city commissioners of the City of Aurora, and Charles Darling who purported to be Corporation Counsel of the City of Aurora, to deprive plaintiff of his rights to freedom of speech and assembly.

The complaint was later amended by adding the following: "The defendants in all matters and things herein alleged acted with the design and purpose of depriving the plaintiff of his rights under the Fourteenth Amendment of the Constitution of the United States to freedom of speech and freedom of assembly."

Defendants moved to dismiss the action because the complaint as to each of them failed to state a claim upon which relief can be granted. Another ground of the motion to dismiss was that the District Court had no jurisdiction over the subject matter, and that the alleged claim was frivolous. In the alternative the motion also asked the Court to strike specified paragraphs of the complaint. The motion referred to portions of a "proclamation" issued by plaintiff on October 13, 1958, the day prior to the date of the meeting.

Defendants offered and filed a copy of the proclamation issued by the Mayor, and an affidavit which alleged, in part, that the Mayor was attempting to incite a public disturbance pursuant to a program of obtaining personal publicity for himself. A counter-affidavit was offered and filed by plaintiff Egan. The District Court, without a trial, directed judgment for the defendants. . . .

There is no dispute that on the day before the meeting, the Mayor did issue a proclamation in manner and form as follows:

"PROCLAMATION

"Whereas:

"A dire emergency exists in Aurora which might spread very conceivably thru out the world, when it is demonstrated openly and conclusively that the power of the people in the choice of their executive can be surmounted and destroyed to the great disad-

vantage of most of the people including those who did not vote for the head of the government, and such blinking and ignoring the basic and vital things in Aurora, the State of Illinois and the Great formerly idealistic and marvelous Government of the United States of America which from its inception until about 45 years ago was the almost holy light of downtrodden men everywhere, the inspiration for living to those who had faith in us and our ideals, principals and basic pronouncements were the hope of the world, in comparison we are now preserving vicious dictatory, old corrupt and tottering governments and turning all of the wealth created by our ancestors and modern day potentialities in a mad race to keep factories working and a few all powerful against the interests, well being and now the very survival of every man woman and child on this entire earth.

"I Therefore Proclaim A State Of Emergency In Aurora Illinois and ask every able bodied citizen of this country, who does not have a criminal, insane or other special unsavory record to come to the city hall council chambers at the city hall at 7 P.M., Tuesday night Oct. 14, 1958 to see if the people can be heard and get a remedy from their ills as some of our predecessors did to thro off the yoke of absolute monarcy and potential slavery in their day. I will welcome all races, all creeds and even legally registered Communists who are welcome if the are sincerely willing to help preserve our laws and bear arms for this purpose and to preserve our great heritage, priceless ideals, principals and purposes or rather and this is important, Come Back To Them, all races creeds and colors are invited to "bear arms," as the Constitution provides, the protection and preservation of the law in Aurora and let us once more be the City of "Lights" which guides the way by attending this most important meeting in the history of Aurora. /s/ PAUL EGAN Mayor of Aurora, Illinois."

The affidavit filed upon behalf of defendants recited a course of conduct by Egan covering three years by which it is claimed he attempted to obtain continuous personal publicity by press, radio and otherwise; that he had discharged or attempted to discharge twelve persons as Chief of Police, most of whom were appointed by him, and that on one occasion he appointed a young lady as Chief of Police who was publicity agent for several Chicago taverns, well knowing she had no experience for the office; that Egan constantly solicited publicity from the press, radio and television for his acts and doings; that he refused release from jail although a person was available and ready to put up bond, and that he demanded his attorney telephone the President of the United States and the Governor of the State of Illinois demanding that he be pardoned or released without bail.

The motion of the defendants recited that when Egan asked every able-bodied citizen, even registered Communists, to come to the meeting, bearing arms, for the purpose of throwing off the yoke of potential slavery, the real purpose of Egan was to overthrow by use of force and arms the police department of the City of Aurora. The motion also recited the meeting was attended by a packed and boisterous crowd; that in the event of a disturbance it would have exposed the public to serious threat of injury or loss of life because of inadequate exits from the council chambers; that the offense of disturbing the peace was committed in the presence of the police officers.

Egan's affidavit denied he was attempting to incite a public disturbance at the time and place of the events alleged in the complaint; it asserted the crowd was not boisterous; that he never appointed a parrot as Chief of Police of the City of Aurora, and that he did not appoint twelve persons as Chiefs of Police. Egan also recited that he had been acquitted by a jury of the charge he had vio-

lated Section 160 of the Criminal Code of the State of Illinois which charge was brought against him after his arrest at the meeting.

THE BASIS OF JURISDICTION OF THE TRIAL COURT.

The basis for federal jurisdiction of the trial court is U.S.C.A. Title 28 §1331 and U.S.C.A. Title 28 §1343 (1) and (4).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE.

The reasons why a Writ of Certiorari should be granted in this case are:

(1) Decisions of the Court of Appeals in cases arising under the Civil Rights statutes, particularly in respect of the immunity which may be extended to state officers or officials are in conflict with each other. (NOTE: This Court granted a Writ of Certiorari in the case of *Monroe* v. *Pape, et al.*, and it is now pending as Case No. 712 on the docket of this Court. This case and the *Monroe* case both involve this problem.)

(2) The decision of the court below is in conflict with the decisions of this Court in respect of immunity which may be extended to state police officers and sheriffs and their staffs.

(3) There has also been decided in the Court below important questions of federal law which have not been, but should be, settled by this Court. Among these are the following: Whether the Mayor of a state municipality speaking as such is protected only by the laws of the state, or whether he is protected by the provisions of the Fourteenth Amendment as well; whether "a local controversy . . . involving a dispute between officials and officers of a

municipality is not the kind of a case which should be brought in the federal courts; whether Federal jurisdiction, under the Civil Rights Acts, U.S.C.A. Title 42, §§ 1983 and 1985, is to be exerted only in exceptional cases involving such an emergency or great urgency as necessitate action to prevent irreparable injury."

4. The lower court based its decision, in part, upon the notion that the presence of state remedies precluded petitioner from exercising remedies available to him under the Civil Rights Acts.

ARGUMENT.

Elaborations of the foregoing reasons are stated below:

The United States Court of Appeals has held in many cases that certain state officers and officials are immune from liability under the Civil Rights Acts involved here. This in contrary to the decisions of *Burt* v. *City of New York, et al.*, 156 F. 2d 791 (2d Cir.) and *Picking v. Pennsylvania R. Co. et al.*, 151 F.2d 240, and we believe it is contrary to the decisions of this Court in *Screws et al.* v. *United States*, 325 U.S. 91 and *Williams* v. *United States*, 341 U.S. 97.

In the case of *Burt* v. *City of New York*, 156 F.2d 791, the Circuit Court of Appeals for the Second Circuit held the complaint good which charged that certain officers of the City of New York were discriminating against the plaintiff, an architect.

In the *Picking* case the Court of Appeals for the Third Circuit held that police officers might be liable under the Civil Rights Acts.

In *Screws* this Court held that a sheriff might be held liable to criminal prosecution under what is now U.S.C.A. Title 18, §242.

We regard this statute as the criminal counterpart of the statutes relating to civil liability embodied in what is now U.S.C.A. Title 42, §§ 1983 and 1985, the critical statutes here. See *Burt* v. *City of New York*, 156 F.2d 792.

In *Williams* this Court held that a police officer was liable to criminal prosecution under the same section as was involved in *Screws*. As a matter of fact, there are many other nuances regarding police and sheriffs which demonstrate that the lower courts, including Circuit Court of Appeals, are in confusion in respect of the question involved here.

The Court of Appeals for the Seventh Circuit has either ignored or misinterpreted the principles of *Screws* and *Williams*. In a series of opinions it has held that police officers, sheriffs, judges, justices of peace, administrators of penal institutions, state's attorneys and assistant state's attorneys have an immunity from civil liability under the Civil Rights Acts.

In the instant case the Court of Appeals for the Seventh Circuit relied upon *Tenney et al.* v. *Brandhove*, 341 U.S. 367 to justify these "immunities". In view of the fact that that case held legislators were immune from liability under the critical act because it was burdened with almost three centuries of practice, statutes and decisions justifying such immunity and related to a necessary function of a coordinate branch of government, we believe that the Court of Appeals of the Seventh Circuit misconceived this decision.

The statute clearly says "every person," and until this Court decides otherwise, we believe it means what it says: every person shall be liable if he violates the Statute.

To demonstrate the confusion which exists in lower courts we show:

The Third Circuit has held that such immunities do not exist. *Picking* v. *Pennsylvania R. Co.*, 151 F.2d 240; *Valle et al.* v. *Stengel, et al.*, 176 F.2d 697. The Fifth Circuit upheld a complaint on grounds similar to those alleged in the complaint here in *Davis, et al. v. Turner, et al.*, 197 F.2d 847 and in *Lewis* v. *Bradtigam, et al.*, 227 F.2d 924. It upheld a directed verdict for a sheriff on the ground that there was no proof that the sheriff acted under color of state law or with specific intent to deny the plaintiff Constitutional rights in *Simmons* v. *Whitaker*, 252 F.2d 224. It affirmed, in *Jackson et al.* v. *Duke*, 259 F.2d 3, a judgment in which the complaint involved a beating.

The Sixth Circuit held adversely to the lower court's decision in *McShane* v. *Moldovan et al.*, 172 F.2d 1016.

In the Ninth Circuit in the case of *Aguon* v. *City of Compton, et al.*, 239 F.2d 226, under circumstances similar to those of this case a complaint was dismissed. In that case a city was held immune from liability.

Coming down to the Seventh Circuit, as we read the cases, this Court is at war with itself.

In *Grach* v. *Maguahan*, 297 F.2d 714, it upheld a complaint which alleged an unreasonable search and a beating to obtain a confession, and in *Wakat* v. *Harlib*, 253 F.2d 59, affirmed a judgment for the victim of cruel beating on the ground that the police regulation of the City of Chicago, Illinois, permitted unequal protection of the law in respect of those who had a criminal record. As we read this opinion, it also approved a judgment for denial of due process of the law (Cf. *Coleman* v. *Johnson, et al.*, 247 F.2d 273.)

Notwithstanding these decisions, the Seventh Circuit in the following cases has in effect overruled the decisions cited above:

Jennings v. *Nester, et al.*, 217 F. 2d 153; *Stiff, et al.* v. *Finch, et al.*, 267 F.2d 237; and the case at bar.

There are other cases, but these are enough to elicit sympathy for the lower courts which have attempted to resolve questions which have arisen in civil cases under the Civil Rights Acts. (See *Hoffman* v. *Halden, et al.*, 268 F.2d 280, 289 *and Deloach* v. *Rogers, et al.*, 268 F.2d 928, 930.

II.

A. In the opinion of the court below it took occasion to state that petitioner's rights, as Mayor, arise under and are protected by the laws of the State of Illinois. If the Court meant by this, as was contended by the respondents in the court below, that when the petitioner was speaking as Mayor, he was bereft of the protection of the Fourteenth Amendment, a serious question not heretofore decided by this court is presented. It ought to be decided.

That *Snowden* v. *Hughes*, 321 U.S. 1 is not applicable to the present case is patent. First, disposed of the contentions raised by the privileges and immunities clause of the Fourteenth Amendment, it is held (pp. 6, 7) that the nomination for election as a candidate for state office was not one which derived from being a citizen of the United States, but, rather, was one which derived from state citizenship under the doctrine of the *Slaughter House* Cases, 16 Wall, 36, 74, 79. Second, it considered the equal protection of the law provision of the Fourteenth Amendment. It held in respect of this provision that there was no showing or contention that there was any purposeful discrimination accorded Snowden.

It held that the use of the words "wilful" and "malicious" did not supply the deficiency of allegations which showed that the conduct of the respondent was discriminatory.

In any event, the petitioner disclaimed, at the bar of this Court, any contention that class or racial discrimination was involved. For an enlightened analysis of the opinion of this Court in *Snowden* see *Burt* v. *New York City, et al.*, 156 F.2d 791, 792.

Below the respondents relied on the *Slaughter House* Cases, 16 Wall. 36, and on *Snowden* v. *Hughes, et al.*, 321 U.S. 1.

We do not believe that the rulings of the Supreme Court in these cases hold that because a Mayor is a Mayor of a state municipality his right to the protection of free speech under the Fourteenth Amendment to the Constitution of the United States is divested, even when he speaks as a Mayor.

Ever since *Cantwell* v. *Connecticut*, 310 U.S. 296, it is settled that "The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws which relate to the liberties embodied in the First Amendment. (p. 303) Freedom of speech is one of these. (See also *Kunz* v. *New York*, 340 U.S. 200.) None of the political scientists has ever suggested that the Fourteenth Amendment does not protect state officials as well as others. We suppose that so long as this Court sits, respondents' notions on this subject will never be adopted.

B. The opinion of the court below states that a "local controversy" is not the kind of a case which should be brought in a Federal Court.

We contend that this language ought not be permitted to find its way into the body of our law.

The Congress of the United States makes our statutory law. This case comes within the ambit of U.S.C.A. Title 42 §§ 1983 and 1985. It is not for the courts to say that those who have a case within the ambit of the statutes enacted by Congress ought not bring their cases in the Federal Court simply because the predilections of judges of lower courts are contrary to the Congressional command.

We are unable to find any cases on this subject, probably because this may be the first decision of the court so bold as to make a decision of this character. In *Burt v. City of New York*, 156 F.2d 791, the Second Circuit, apparently not in sympathy with the statute in question here, regarded it as its duty to entertain a complaint, which it believed could not be proved.

C. The lower court held on the authority of its own case, People v. Bibb, 252 F.2d 217, that Federal jurisdiction is to be exerted only in exceptional cases involving such an emergency or great urgency as necessitates action to prevent ireparable injury.

This is contrary to the decisions of this Court in *Screws v. United States*, 325 U.S. 91 and in *Williams v. United States*, 341 U.S. 97. In each of these cases, the emergency and urgency of the violation of the Civil Rights Acts had long since past. The injury was irreparable in each of these cases. Screws was dead and Williams had had his beating. The only case decided by this court involving the

Act critical here which was remedial in character is *Davis et al v. The County School Board* reported *sub nom, Brown v. The Board of Education of Topeka, Kansas*, 347 U.S. 483.

That case, which arose in Virginia invokes the Civil Rights Act. It was originally reported in 103 F. Supp. 337. See page 338, footnote 2 (At that time the Statute critical here was codified at U.S.C. Title 8 §41.)

Of course, there were matters of great urgency involved in that case but that does not mean that the Congressional command embodied in U.S.C.A. Title 42 § 1983 and § 1985 can be thwarted absent emergency or great urgency.

This concept of the Seventh Circuit is contrary to the Statute, and as we have said contrary to the court's decision in *Screws* and in *Williams*. It has no place in the law. Certainly, it is a concept of law which is of prime importance in the administration of the Civil Rights Acts which ought to be decided by this Court.

III.

Finally, the court below said in *Monroe v. Pape*, 272 F. 2d 365, 366 and quoted it in this case: "Plaintiffs are not without remedy in the state court." If by these words the Court of Appeals meant that because the victim of a deprivation of civil rights mentioned in §1983 and §1985 has remedies in the State Courts based upon State law he will be denied his action authorized by the Civil Rights Acts, such a motion runs counter to he decision in *Screws v. United States*, 325 U.S. 91, 108 where it is made clear that actions under the Civil Rights Acts are not to be considered in state law terms and that the right which may arise under state law does not preclude action under the federal law. (See footnote 10, p. 108.)

CONCLUSION.

The decision of the Court of Appeals is such that it ought not stand. There are parts of it which show conflicting decisions in the Court of Appeals, parts of it which are in conflict with decisions of this Court, parts of it that present novel questions of Federal law which have not been, but ought be, decided. On the whole, the decision of the court below contains the seeds of destruction of the rights Congress intended should be given to victims of those who intentionally deny others their Constitutional rights when it passed the Civil Rights Acts. If this is a desirable end, it is one that Congress alone is empowered to effectuate. The enlightened opinion of L. Hand, *J.* is, in our opinion, a perfect guide.

It is suggested that a Writ of Certiorari be granted and that it be heard with *Monroe* v. *Pape*, already taken on certiorari by this Court, Docket 712.

Respectfully submitted,

JOSEPH KEIG, SR.
Attorney for Petitioner.

Of Counsel:
SOL R. FRIEDMAN
EDWIN R. ARMSTRONG

APPENDIX.

EXHIBIT A.

Opinion of the Court of Appeals in Egan v. City of Aurora, et al., reported in 275 F.2d 377 et seq.

Before HASTINGS, *Chief Judge*, DUFFY, *Circuit Judge*, and STECKLER, *District Judge*.

DUFFY, *Circuit Judge*.

Plaintiff is the Mayor of the City of Aurora, Illinois. He brought this suit charging violation of the Federal Civil Rights Statutes, Title 42 U.S.C.A. §§ 1983 and 1985, and claims damages in the amount of $5,000,000.00.

The complaint alleges that plaintiff, as Mayor, was conducting a public meeting before a group in excess of two hundred people in the Council Chambers in the City of Aurora, when defendant Donald Curran, purporting to be acting as Chief of Police of the City of Aurora, and defendants Stover, Straud, Rukas, Pfiefer, Schuhow and Day, all purporting to be police officers of the City of Aurora, without probable cause, arrested plaintiff under color of an Illinois breach-of-the-peace statute, and incarcerated him in the city jail for a period of more than four hours. Plaintiff alleges such action was the result of a conspiracy between the above-named defendants and defendants Boucon, Konrad, Wyeth and Robertson, acting as individuals and as city commissioners of the City of Aurora, and Charles Darling who purported to be Corporation Counsel of the City of Aurora, to deprive plaintiff of his rights to freedom of speech and assembly.

The complaint was later amended by adding the following: "The defendants in all matters and things herein alleged acted with the design and purpose of depriving the plaintiff of his rights under the Fourteenth Amendment of the Constitution of the United States to freedom of speech and freedom of assembly."

Defendants moved to dismiss the action because the complaint as to each of them failed to state a claim upon which relief can be granted. Another ground of the motion to dismiss was that the District Court had no jurisdiction over the subject matter, and that the alleged claim was frivolous. In the alternative the motion also asked the Court to strike specified paragraphs of the complaint. The motion referred to portions of a "proclamation" issued by plaintiff on October 13, 1958, the day prior to the date of the meeting.

Defendants offered and filed a copy of the proclamation issued by the Mayor, and an affidavit which alleged, in part, that the Mayor was attempting to incite a public disturbance pursuant to a program of obtaining personal publicity for himself. A counter-affidavit was offered and filed by plaintiff Egan. The District Court, without a trial, directed judgment for the defendants.

Rule 12(b) provides: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 * * *." We shall so consider the issues before us for decision.

There is no dispute that on the day before the meeting, the Mayor did issue a proclamation in manner and form as follows:

"Proclamation

"Whereas;

"A dire emergency exists in Aurora which might spread very conceivably thru out the world, when it is demonstrated openly and conclusively that the power of the people in the choice of their executive can be surmounted and destroyed to the great disadvantage of most of the people including those who did not vote for the head of the government, and such blinking and ignoring the basic and vital things

in Aurora, the State of Illinois and the Great formerly idealistic and marvelous Government of the United States of America which from its inception until about 45 years ago was the almost holy light of downtrodden men everywhere, the inspiration for living to those who had faith in us and our ideals, principals and basic pronouncements were the hope of the world, in comparison we are now preserving vicious dictatory, old corrupt and tottering governments and turning all of the wealth created by our ancestors and modern day potentialities in a mad race to keep factories working and a few all powerful against the interests, well being and now the very survival of every man woman and child on this entire earth.

"I Therefore Proclaim A State Of Emergency In Aurora Illinois and ask every able bodied citizen of this country, who does not have a criminal, insane or other special unsavory record to come to the city hall council chambers at the city hall at 7 P.M., Tuesday night Oct. 14, 1958 to see if the people can be heard and get a remedy from their ills as some of our predecessors did to thro off the yoke of absolute monarcy and potential slavery in their day. I will welcome all races, all creeds and even legally registered Communists who are welcome if the are sincerely willing to help preserve our laws and bear arms for this purpose and to preserve our great heritage, priceless ideals, principals and purposes or rather and this is important, Come Back To Them, all races, creeds and colors are invited to 'bear arms,' as the Constitution provides, the protection and preservation of the law in Aurora and let us once more be the City of 'Lights' which guides the way by attending this most important meeting in the history of Aurora. /s/ Paul Egan Mayor of Aurora, Illinois."

The affidavit filed upon behalf of defendants recited a course of conduct by Egan covering three years by which it is claimed he attempted to obtain continuous personal

publicity by press, radio and otherwise; that he had discharged or attempted to discharge twelve persons as Chief of Police, most of whom were appointed by him, and that on one occasion he appointed a young lady as Chief of Police who was publicity agent for several Chicago taverns, well knowing she had no experience for the office; that Egan constantly solicited publicity from the press, radio and television for his acts and doings; that he refused release from jail although a person was available and ready to put up bond, and that he demanded his attorney telephone the President of the United States and the Governor of the State of Illinois demanding that he be pardoned or released without bail.

The motion of the defendants recited that when Egan asked every able-bodied citizen, even registered Communists, to come to the meeting, bearing arms, for the purpose of throwing off the yoke of potential slavery, the real purpose of Egan was to overthrow by use of force and arms the police department of the City of Aurora. The motion also recited the meeting was attended by a packed and boisterous crowd; that in the event of a disturbance it would have exposed the public to serious threat of injury or loss of life because of inadequate exits from the council chambers; that the offense of disturbing the peace was committed in the presence of the police officers.

Egan's affidavit denied he was attempting to incite a public disturbance at the time and place of the events alleged in the complaint; it asserted the crowd was not boisterous; that he never appointed a parrot as Chief of Police of the City of Aurora, and that he did not appoint twelve persons as Chiefs of Police. Egan also recited that he had been acquitted by a jury of the charge he had violated Section 160 of the Criminal Code of the State of Illinois, Ill. Rev. Stat. 1959, c. 38, § 160, which charge was brought against him after his arrest at the meeting.

[1] A summary judgment may not be entered pursuant to Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A., unless there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter

of law. We think the questions of fact which are disputed in this case are immaterial, and that the defendants are entitled to judgment as a matter of law.

Whether Mayor Egan's course of conduct, including the call to the public meeting in the council chamber, was "political baffoonery" as characterized by the defendants, or a sincere desire by Egan to discuss issues of the day, is not of great importance under the circumstances under which the citizens of Aurora gathered at the meeting on the evening of October 14, 1958. It is evident that the invitation to attend the meeting extended by the Mayor, suggesting those attending bear arms, was fraught with great danger to all those crowded into the Council Chambers.

We are faced with a situation where one state public official seeks to invoke the protection of the Federal Government against other state officials in the preservation of what he conceives to be his official status. Mr. Egan alleges he was conducting the meeting in his "official capacity as Mayor of the City of Aurora." Plaintiff's rights, as mayor, arise under and are protected by the laws of the State of Illinois.

[2] A local controversy such as this involving a dispute between officials and officers of a municipality is not the kind of case which should be brought in the federal courts. As we stated in People ex rel. Turnbaugh v. Bibb, 7 Cir., 252 F.2d 217, 219: "* * * Federal jurisdiction is to be exerted only in exceptional cases involving such an emergency or great urgency as necessitate action to prevent irreparable injury. The jurisdiction to interfere with the proceedings of state governmental bodies charged with the prosecution and punishment of offenders is an exceedingly delicate one to be exercised with the greatest of car and nicest sense of propriety: * * *"

The latest expression of this Court on the subject before us for decision is Monroe v. Pape, 7 Cir., 1959, 272 F.2d 365. There an action was brought under the Federal Civil Rights Act because of alleged misconduct of Chicago police officers. The City of Chicago was one of the de-

fendants. We sustained the District Court's dismissal of the cause on the ground the complaint did not state a claim upon which relief could be granted. We relied largely upon our decision in Stift v. Lynch, 7 Cir., 267 F.2d 237.

In the Stift case, the defendants were respectively, a sheriff, a deputy sheriff, a justice of the peace, a state's attorney and an assistant state's attorney. We disagreed with the argument that the Federal Civil Rights Act applies to "every person", pointing to the case of Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019, where the Supreme Court held members of the California State Legislature acting through a Committee were immune to action under the Federal Civil Rights Act.

In Stift, we referred to some decisions in other circuits which were contrary to our holding, but also cited others showing our decision was in accord with the great weight of authority. We distinguished the case of Wakat v. Harlib, 7 Cir. 253 F.2d 59. Relying upon our decisions in Eaton v. Bibb, 7 Cir., 217 F.2d 446, Miles v. Armstrong, 7 Cir., 207 F.2d 284, and United States ex rel. Atterbury v. Ragen, 7 Cir., 237 F.2d 953, we held the complaint did not state a claim under the Federal Civil Rights Act upon which relief could be granted against the sheriff and the deputy sheriff. We held the justice of the peace was a judicial officer to which the common law immunity would apply. We held no claim was stated against the state's attorney and the assistant state's attorney.

[3, 4] In Jennings v. Nester, 7 Cir., 217 F.2d 153, 155, we pointed out that the Federal Civil Rights Act was not enacted to discipline local law-enforcement officials. We stated: "The common law provides adequate actions for damages against errant law enforcement officials." In Monroe v. Pape, 272 F.2d 365, 366, we said: "Plaintiffs are not without their remedy in the state court." These comments are applicable to the case at bar.

We hold the District Court was correct in entering judgment for all of the defendants.

Affirmed.

EXHIBIT B.

Opinion of the United States District Court, Northern District of Illinois, Eastern Division in the Case of Paul Egan v. City of Aurora, et al., reported in 174 F. Supp. 794.

CAMPBELL, *Chief Judge.*

Plaintiff, Paul Egan, brings this action against defendants for alleged violation of the federal civil rights statutes, Title 42, U.S.C.A., §§ 1983 and 1985 and claims damages in the amount of $5,000,000. Jurisdiction is based upon Title 28 U.S.C. §§ 1331 and 1343.

The substantial allegations of the complaint are as follows: Plaintiff, in his official capacity as Mayor of the City of Aurora, was conducting a public meeting before a group in excess of 200 people in the City Hall council chambers of the City of Aurora when defendant, Donald Curran, purporting to be acting as Chief of Police of the City of Aurora, and defendants, Hershell Stover, LeRoy Strand, Anthony Rukas, John (Jack) Pfiefer, Ray Schuhow and John Day, all purporting to act as police officers of the City of Aurora, laid their hands upon plaintiff, arrested him without warrant and without probable cause but purporting to act under color of an Illinois "breach of peace" statute (Ill. Rev. Stat. (1957) c. 38, § 160), and "carried him by force of arms, physically from the rostrum on which he was speaking and incarcerated him in the city jail of the City of Aurora."

Plaintiff alleges that such action was taken as a result of a conspiracy to deprive plaintiff of his rights to freedom of speech and assembly under the Fourteenth Amendment of the United States Constitution between the above named defendants and defendants, Leo Boucon, William G. Konrad, H. A. Wyeth, Sr., and William B. Robertson, acting as individuals and as City Commissioners of the

City of Aurora, and defendant, Charles Darling, purported Corporation Counsel of the City of Aurora.

Defendants have filed a motion to dismiss or in the alternative to strike on the grounds that the complaint fails to state a cause of action; that this Court lacks jurisdiction because plaintiff's claim is insubstantial, immaterial and made solely for the purpose of obtaining jurisdiction; and finally, that plaintiff's claim is frivolous.

Title 42 U.S.C.A. § 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42, U.S.C.A. § 1985, also known as the "Ku Klux Klan section," provides a civil remedy against "two or more persons" who may conspire to deprive another of constitutional rights as therein defined.

It is a matter of well documented history that civil rights legislation passed shortly after the Civil War to combat "Black Codes," Ku Klux Klan activities and general State frustration of Negro rights was, for the most part, strictly construed through a series of cases which all but eradicated original Congressional intent. In re Slaughter-house Cases, 16 Wall. (83 U.S.) 36, 21 L.Ed. 394; United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588; United States v. Harris, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290; In re Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835; Baldwin v. Franks, 120 U.S. 678, 7 S.Ct. 763, 32 L.Ed. 766; James v. Bowman, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979.

These decisions not only narrowly interpreted the rights, privileges and immunities secured by the Fourteenth

Amendment and restricted the protection of those rights to actions of a State but also declared certain of the Acts unconstitutional. Sections 1983 and 1985, historical remnants of the original legislation, created remedies today for violation of rights in the form of civil causes of action.

[1] Though the original purpose of civil rights legislation was to secure the civil and political rights of Negroes, it is clear today that such legislation embraces the protection of basic civil and political rights of all persons within the jurisdiction of the respective States, whether citizens or not, from the abuse of State power. Such protected rights include, apart from political rights, the rights to a fair trial, including freedom from sham trials; to be free from arrest and detention by methods constitutionally forbidden and from extortion of property by such methods; from extortion of confessions; from mob action incited or shared by state officers; from failure to furnish police protection on proper occasion and demand; from interference with the free exercise of religion, freedom of the press, freedom of speech and assembly. Screws v. United States, 325 U.S. 91, 126, 65 S.Ct. 1031, 89 L.Ed. 1495; Culp v. United States, 8 Cir., 131 F.2d 93; Catlette v. United States, 4 Cir., 132 F.2d 902; United States v. Sutherland, D.C., 37 F.Supp. 344; United States v. Trierweiler, D.C., 52 F.Supp. 4.

[2] It is likewise apparent that federal courts cannot be so overzealous in their desire to protect individual rights from State abuse that they unjustifiably deprive the States of their inherent sovereignty also protected by the United States Constitution. For these reasons, the federal courts, in applying the Civil Rights Acts have been consistently solicitous of "delicate state-federal relationships." Francis v. Lyman, 1 Cir., 216 F.2d 583, 588. In Screws v. United States, supra, 325 U.S. at pages 108, 109, 65 S.Ct. at page 1039, the Supreme Court stated with regard to the criminal counterpart of Section 1983:

> "We agree that when this statute is applied to the action of state officials, it should be construed so as

> to respect the proper balance between the States and the federal government in law enforcement. Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States. * * * The Fourteenth Amendment did not alter the basic relations between the States and the national government. * * * Our national government is one of delegated powers alone."

In People ex rel. Turnbaugh v. Bibb, 252 F.2d 217, at pages 219 and 229, a case involving Section 1983, the Seventh Circuit Court of Appeals quoted with approval from an earlier case: "

> "* * * Federal jurisdiction is to be exerted only in exceptional cases involving such an emergency or great urgency as necessitate action to prevent irreparable injury. The jurisdiction to interfere with the proceedings of state government bodies charged with the prosecution and punishment of offenders is an exceedingly delicate one to be exercised with the greatest of care and nicest sense of propriety. In the absence of the exceptional circumstances mentioned, a sense of comity and due regard for state jurisdiction demand that the applicant be left to his remedies with the state courts who, no less than those of the United States, are charged with the obligation to recognize and protect the constitutional rights."

The Seventh Circuit Court of Appeals has expressed this philosophy in a number of other cases. Davis v. Foreman, 251 F.2d 421; United States ex rel. Atterbury v. Ragen, 237 F.2d 953; Ortega v. Ragen, 216 F.2d 561; Geach v. Moynahan, 207 F.2d 714; Miles v. Armstrong, 207 F.2d 284. Also see Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253; Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497; Stampinato v. M. Breger & Co.,

D.C., 166 F.Supp. 33; Smith v. Jennings, D.C., 148 F. Supp. 641.

[3] Because of this "delicate federal-state relationship," the federal courts have been very strict in requiring a plaintiff to allege not only a denial of federal rights by the state but also that the denial was accomplished for the purpose of robbing plaintiff of those rights. Snowden v. Hughes, supra; Dye v. Cox, D.C., 125 F.Supp. 714; Jinks v. Hodge, D.C., 11 F.R.D. 346. Nor can such allegations merely state conclusions for as our Court of Appeals pointed out in Ortega v. Ragen, 7 Cir., 216 F.2d 561, 563:

> "'It is sufficient for us in this case to say: that * * * we disregard, as mere conclusions, the loose and general, the factually unsupported, characterizations of the complained of acts of the defendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights; that the things defendants are alleged to have done, as distinguished from the conclusions of the pleaders with respect to them, do not constitute a deprivation of the civil rights of plaintiffs, do not give rise to the cause of action claimed; * * *."

Besides the area of federal-state relationships, the federal courts have also been cognizant of another area upon which the broad language of the Civil Rights Acts might well trespass with ominous results. This is the area of common law immunity. In Tenney v. Brandhove, 341 U.S. 367, at page 376, 71 S.Ct. 783, at page 788, 95 L.Ed. 1019, the Supreme Court, in holding that members of a legislative investigating committee are immune under the Civil Rights Acts with regard to their official duties, made this statement:

> "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."

Following the lead of the Supreme Court in Tenney v. Brandhove, supra, the federal courts have declared on a basis of general law (See Nelson v. Knox, 6 Cir., 256 F.2d 312, 314) or on a basis of State law (See Charlton v. City of Hialeah, 5 Cir., 188 F.2d 421) that the Civil Rights Acts were not intended to abrogate totally the common law immunities which attached to broad categories of legislative, judicial and even administrative officials. While in their official capacities, complete immunity has been extended to judges (Kenney v. Fox, 6 Cir., 232 F.2d 288; Francis v. Crafts, 1 Cir., 203 F.2d 809), to superintendents of penal institutions (Francis v. Lyman, 1 Cir., 216 F.2d 583), and to police delivering prisoners to penal institutions (Dunn v. Gazzola, 1 Cir., 216 F.2d 709). Municipal council members and similar subordinate legislative bodies have been accorded qualified immunities. Nelson v. Knox, supra; Cobb v. City of Malden, 1 Cir., 202 F.2d 701. A series of cases have held that cities, in their sovereign capacities, are immune to suit for damages either under the theory that the Civil Rights Acts did not create a tort liability where none existed at common law or simply because the term "person" as used by Section 1983 does not include a municipal corporation. Cuiksa v. City of Mansfield, 6 Cir., 250 F.2d 700; Agnew v. City of Compton, 9 Cir., 239 F.2d 226; Cobb v. City of Malden, supra; Charlton v. City of Hialeah, supra; Graves v. City of Bolivar, D.C., 154 F. Supp. 625.

The broad language of the Civil Rights Acts has been further restricted by a practical apprehension which has perhaps been best stated by Judge Hand in Burt v. City of New York, 2 Cir., 156 F.2d 791 at page 793:

> "The only protection at present is in the difficulty of proving such cases which is great; but, so far as we can see, any public officer of a state, or of the United States, will have to defend any action brought in a district court * * * in which the plaintiff, however irresponsible, is willing to make the necessary allegations."

In other words, how can the public officer who acts in good faith be protected from irresponsible, time-consuming, expensive litigation? There is no question but that this consideration has become a factor in the individual case. Agnew v. City of Compton, supra, 239 F.2d at page 231; Francis v. Lyman, supra; Cobb v. City of Malden, supra, 202 F.2d at page 707.

[4] The courts are aware that we are living in a civil rights conscious era with an intense emphasis on individual rights and liberties which are in part guarded by the revitalized Civil Rights Acts. In my opinion it is imperative that federal courts use the greatest degree of discretion in dealing with cases of this nature to prevent an abuse of the broad language of the Civil Rights Acts and to achieve a healthy balance between individual, public official and State. The restrictive federal courts' policy induced by "delicate federal-state relationships" and common law immunities plays a major part in achieving this balance but more important at the moment, as I see it, is the increasing danger that civil rights legislation may be used as an abusive measure against public officials. Because the federal government has chosen to give a cause of action to an aggrieved individual, under the Civil Rights Acts, it is incumbent on the federal courts to see that this federally created cause of action is not abused and therefore it is each judge's duty to protect public officials in the good faith performance of their duties from irresponsible litigation.

[5, 6] In addition to being alert for possible abusive use of the Civil Rights Acts, the federal courts should also consider the need for federal supervision of the type of official conduct involved. Where the States have reasonably effective safeguards or remedies, a restrictive reading of the Acts is called for. The theory of the action should also be considered in deciding how strictly to construe the Acts. If the theory is merely one of tort then the Acts should be construed strictly but if the theory is to alter official conduct, a more liberal construction may be called for. If the action is for individual redress, then the

Acts should be construed more strictly than in a broad class action which would be more in keeping with the philosophy of the Acts.

[7] I now consider defendants' motion to dismiss for failure to state a cause of action. Though under certain circumstances, I would be prone to hold a city liable under the Civil Rights Acts, it seems obvious to me that this particular case is one which calls for strict construction. Therefore, I hold that no cause of action is stated against the City of Aurora under Section 1983 or Section 1985 because of the City's common law immunity. Cuiksa v. City of Mansfield, supra; Agnew v. City of Compton, supra; Cobb v. City of Malden, supra; Charlton v. City of Hialeah, supra; and Graves v. City of Bolivar, supra.

[8, 9] As to plaintiff's allegations that a conspiracy exists between the police, City Commissioners and Corporation Counsel of the City of Aurora, I hold that this allegation is a mere conclusion, not supported by any allegations of fact and therefore does not state a cause of action under Section 1985. Ortega v. Ragen, supra. Since the Civil Rights Acts provide no remedy for the wrongful acts of individuals, I hold that the complaint does not state a cause of action against the City Commissioners in their individual capacities. United States v. Cruikshank, supra.

I hold that the complaint does not state a cause of action against the City of Aurora Police Chief and the enumerated police officers for the alleged seizure and incarceration of plaintiff which allegedly deprived him of freedom of speech and assembly in violation of Section 1983.

[10] Plaintiff alleges that defendant, Donald Curran, "purported" to be acting as Chief of Police of the City of Aurora and that the other enumerated defendants "purported" to be acting as police officers of the City of Aurora. In other words, plaintiff has not alleged affirmatively that defendants were, or did act as police officials

but on the contrary, by his pleadings, has implied that defendants were in fact not police officials of the City of Aurora. Since plaintiff has failed to allege affirmatively that defendants were, and acted as, police officials of the City of Aurora, the complaint does not state a cause of action under Section 1983. United States v. Cruikshank, supra. Also see Stift v. Lynch, 7 Cir., 267 F.2d 237.

However, even assuming that the complaint does state a cause of action, I would still have to dismiss the cause and grant judgment for defendants.

Defendants' exhibit "A," a "proclamation" issued by plaintiff, announcing the alleged meeting at which the alleged arrest took place, provides as follows:

> "Whereas:
>
> "A dire emergency exists in Aurora which might spread very conceivably throughout the world, when it is demonstrated openly and conclusively that the power of the people in the choice of their executive can be surmounted and destroyed to the great disadvantage of most of the people including those who did not vote for the head of the government and such blinking and ignoring the basic and vital things in Aurora, the State of Illinois and the Great formerly idealistic and marvelous Government of the United States of America, which from its inception until about 45 years ago was the almost holy light of downtrodden men everywhere, the inspiration for living to those who had faith in us and our ideals, principles and basic pronouncements were the hope of the world, in comparison we are now preserving vicious dictators, old corrupt and tottering governments and turning all of the wealth created by our ancestors and modern day potentialities in a mad race to keep factories working and a few all powerful against the interests, well being and now the very survival of every man, woman and child on this entire earth,

"I therefore Proclaim a State of Emergency in Aurora, Illinois and ask every able-bodied citizen of this country, who does not have a criminal, insane or other special unsavory record, to come to the city hall council chambers at the city hall at 7 P.M., Tuesday night, Oct. 14, 1958 to see if the people can be heard and get a remedy from their ills as some of our predecessors did to throw off the yoke of absolute monarchy and potential slavery in their day. I will welcome all races, all creeds and even legally registered Communists are welcome if they are sincerely willing to help preserve our laws and bear arms for this purpose and to preserve our great heritage, priceless ideals, principals and purposes or rather *and this is important,* Come Back to Them, all races, creeds and colors are invited to 'bear arms,' as the Constitution provides in the protection and preservation of the law in Aurora and to let us once more be the City of 'Lights' which guides the way by attending this most important meeting in the history of Aurora." (174 F. Supp. 51)

Defendants maintain that plaintiff was attempting to incite a public disturbance and the invasion and capture of the duly constituted Police Department of the City of Aurora and that this "proclamation" plus the fact that the council chambers, packed with people, presented a public danger in the event of a disturbance, gave defendants probable cause to arrest plaintiff.

[11] The affidavits of the parties reveal a desire for publicity on the part of plaintiff which is demonstrated by numerous acts such as, filing a number of actions in the Circuit Court of Kane County without prosecuting them; discharging twelve persons as Chief of Police of Aurora; appointing a young lady who was a publicity agent for certain Chicago liquor taverns, as Chief of Police; directing that his attorney telephone the President of the United States and the Governor of the State of Illinois upon his alleged arrest and incarceration. Of these and many more like acts of the plaintiff, I take judicial notice. Greeson

v. Imperial Irr. Dist., 9 Cir., 59 F.2d 529, 531; Cyclopedia of Federal Procedure, Section 26.226.

Considering plaintiff's contention that he has been deprived of freedom of speech and assembly in violation of Section 1983, it is my opinion, in light of the plain uncontradicted facts of this case and the propensities of plaintiff as demonstrated by his past actions, that there is no cause of action under Section 1983. As Justice Brandeis stated in Whitney v. People of State of California, 274 U.S. 357, at page 373, 47 S.Ct. 641, at page 647, 71 L.Ed. 1095:

> "Although the right of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral."

The so-called "clear and present danger" doctrine lays down the requirement that before an utternace can be penalized by government it must, ordinarily, have occurred "in such circumstances [or have been] of such nature as to create a clear and present danger" that it would bring about "substantive evils" within the power of the government to prevent. Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 249, 63 L.Ed. 470. And "in each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" Dennis v. United States, 341 U.S. 494, 510, 71 S.Ct. 857, 868, 95 L.Ed. 1137.

In regard to freedom of assembly it is well to remember that under the common law any assemblage was unlawful which aroused the apprehensions of "men of firm and rational minds with families and property there," and it is not unlikely that the First Amendment takes this principle into account. (See 9 New York Univ.L.Quart.Rev., 1-38.)

[12] Granted then, that these rights, though preferred, are not absolute, it follows that no cause of action under Section 1983 is possible if there is a justified invasion of these rights. Furthermore, the purpose, history and construction of the Civil Rights Acts manifestly deny a cause of action under Section 1983 where a public officer, in good faith, invades the rights to freedom of speech and assembly because of an apparent justification. See Agnew v. City of Compton, supra, 239 F.2d at page 231. This construction is a necessary corollary to Section 1983 for to hold otherwise, as I have pointed out, would be to attribute a contradiction of purpose to the Civil Rights Acts.

[13] In the case at bar, plaintiff not only issued a "proclamation" calling the alleged meeting and asking the people to "bear arms" in order to "throw off the yoke of absolute monarchy and potential slavery," but also carried this meeting into effect which removes the cause from the *in abstracto* theory of Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d. 1356. It is inconceivable that men of "firm and rational minds" with knowledge of the propensities of plaintiff and the purpose of the alleged meeting should not be apprehensive. Clearly, on these facts, there was an immediate, apparent danger to the City of Aurora and since none of the facts indicate that defendants, Police Chief Curran and the enumerated police officers, acted for any other purpose than to protect the community in the good faith performance of their duties, the cause is dismissed. Judgment for defendants.

Exhibit C.

JUDGMENT OF THE COURT.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, March 4, 1960
Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. William E. Steckler, District Judge

PAUL EGAN, Plaintiff-Appellant, vs. CITY OF AURORA, a municipality, etc., et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 12738	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

Exhibit D.

The Fourteenth Amendment of the Constitution of the United States so far as pertinent here reads as follows:

AMENDMENT [XIV].

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Exhibit E.

The First Amendment of the Constitution of the United States so far as is pertinent here reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Exhibit F.

U.S.C.A. Title 42 §1983 reads as follows:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

U.S.C.A. Title 42 § 1985 reads, so far as is pertinent here, as follows:

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust,

or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officers of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties; . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Exhibit G.

Section 20 of the United States Criminal Code as it read, at the time *Screws* v. *United States*, 325 U.S. 91, was decided (May 7, 1945) being U.S.C.A. Title 18, § 242 reads as follows:

"That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 97, 112

PAUL EGAN,

Petitioner,

vs.

CITY OF AURORA, a municipality under the laws of the State of Illinois, LEO BOUCON, WILLIAM G. KONRAD, H. A. WYETH, SR., WILLIAM B. ROBERTSON, DONALD CURRAN, HERSHELL STOVER, LeROY STROUD, ANTHONY RUKAS, JOHN (JACK) PETEFER, RAY SCHUHOW, JOHN DAY and CHARLES DARLING,

Respondents.

BRIEF IN REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO GRANTING OF A PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959.

No. 979

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vs.

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Foreword:

Ever a zealous lawyer in behalf of his client's cause, the writer of this brief believes that it is the duty of lawyers to conserve the time and energies of courts of review to adhere in his arguments to the truth. On page 2 of respondents' brief they purport to show that the affidavit in question filed in support of their motion to dismiss the complaint shows:

(a) that the real purpose for which the petitioner called the meeting at which he was deprived of speech was an attempt to overthrow the police department with force and arms;

(b) that at the time of his arrest petitioner was attempting the invasion and capture of the duly constituted police department by inciting those in the "crowd";

(c) that the "general public" would have been exposed to injury and loss of life in the event of a disturbance.

The affidavit which appears on pages 13-15 of the Appendix in the court below does not mention any of the matters and things of which the Statement of the Case speaks. The attempt to mislead this court in respect of the contents of this affidavit is wasteful and inexcusable.

The burden on this Court and on adversary counsel is great enough without having to contend with a misstatement of the case. The affidavit in question has been an element of contention throughout this case. We have pointed out to the court below that it does not comply with Rule 56(e) of the Rules of Civil Procedure for United States District Courts in that it does not appear affirmatively that the affiant is competent to testify in respect of the matters therein stated.[1] That is not enough. Here we are confronted with a misstatement of facts in respect of what the affidavit says.

There is no justification for treating this case in terms of state law as the respondents impliedly request this court to do. *Screws* v. *United States*, 325 U.S. 91, 108.

The question here is whether the complaint states a claim on which relief could be granted under U.S.C.A. Title 42, § 1983 and § 1985 because the respondents deprived the petitioner of his right to freedom of speech.

---

[1] On a motion to dismiss under Rule 12(a) of the Rules of Civil Procedure for United States District Courts, if an affidavit is filed in support of the motion, it must be treated as a motion for summary judgment under Rule 56.

Meeting the points made by respondents as they appear in their brief:

I.

As the petitioner reads the respondents' brief it concedes that there is a division of authority among the circuits in respect of the supposed immunities which the Court of Appeals for the Seventh Circuit held existent in respect of police officers whose conduct is proscribed by the terms of the critical act. It may be true that one swallow does not make a summer, but it is equally true that two decisions contrary to the decisions of a majority of the circuits does make a conflict of authority between the several circuits. As was pointed out in the *Monroe* case (Docket No. 712 in this court) much more clearly than it was pointed out here, there are other circuits, the decisions of which, sub silento, if not in words, conflict with that of the Seventh Circuit in respect of the liability of police officers under the critical statutes. Moreover, we believe that the decisions in the Seventh Circuit Court conflict with the opinions in *Screws* v. *United States*, 325 U. S. 91 and with the decision of this court in the case of *Williams* v. *United States*, 341 U. S. 97.

The fact that this court has taken the case of *Monroe* v. *Pape, et al* for review is indicative of the importance of this question.

The question of whether or not a municipality is immune from liability under the Civil Rights Act is also important. The case of *Burt* v. *The City of New York, et al*, 156 F. 2d 791 indicates that there is no immunity for cities and municipalities under that act, while the cases cited by the respondents indicate that municipalities have immunity from liability by virtue of state law, notwithstanding that ordinarily state law cannot be permitted to thwart the objectives of federal law where the federal Government is

acting within the scope of its constitutional powers. In addition to all this there is a real question in respect of the communities of municipalities under Illinois law.

The question here is not whether the decision below is proper, as respondents seem to suppose, but rather it is whether this case presents problems calling for the exercise of supervisory powers of this court. We believe that this case does call for the exercise of this power.

Because there is involved in this case a matter which we believe is of great importance which is not involved in the *Monroe* case, we believe it would be prudent to take this case with Monroe and settle all the common questions and at the same time dispose of the additional question to which we now advert.

II.

Respondents contend that Egan, speaking as a Mayor of a state municipality, derives this right to speak as a mayor from state law and not from the Fourteenth Amendment. We differ, notwithstanding *The Slaughter House* Cases, 321 U. S. 1, and *Snowden* v. *Hughes*, 321 U. S. 91. The question involved is a constitutional question of prime importance not heretofore decided by this Court. It is one which calls for the decision of this Court.

Respectfully submitted,

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RICHARD F. LEVY

FILE COPY

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

The Petitioner's Statement of the Case is incomplete in the following important respects:

1. There is no allegation that any of Petitioner Egan's individual rights were or have been in jeopardy. Egan alleges solely that he was conducting the meeting in question

in his "official capacity as Mayor of the City of Aurora, Illinois".

2. Defendants' Affidavit in Support of Defendants' Motion To Dismiss stood undenied as to the following important items:

(a). That the real purpose for which the meeting of October 14, 1958 was called by Petitioner Egan was to attempt to overthrow by the use of arms and force, the duly constituted police department of the City of Aurora, and

(b). That Petitioner Egan at and just prior to the time of his alleged arrest was attempting the invasion and capture of the duly constituted police department of the City of Aurora by inciting persons within the crowd.

(c). That the meeting in question was attended by a packed crowd in chambers where in the event of a disturbance which was clearly and presently threatened by the actions of plaintiff, the means of exit were such as would have exposed the general public to serious threat of injury and loss of life.

ARGUMENT

This Court should clearly deny the Writ of Certiorari.

Petitioner Egan seeks to abolish the long line of decided cases granting official immunity under the Federal Civil Rights Acts: He would also induce this Court to extend the protection of the Civil Rights Acts to the wholly treacherous ground of relationships between one state official and another. Petitioner cites no warrant in law for so overruling or extending as pointed out below. Reason and authority support the conclusion that the Petition for the Writ of Certiorari should be denied.

I.

Official immunity under the Civil Rights Acts is a settled doctrine well founded in law and in common sense.

Petitioner admits that the Courts of Appeal have held in many cases that certain state officers and officials are immune from liability under the Civil Rights Acts (Petition p. 9).

We remind the Court that the only decisions to the contrary cited by Petitioner are *Burt* v. *City of New York, et al.*, 156 F. 2d 791 (C.A. 2, 1946) and *Picking* v. *Pennsylvania R. Co., et al.*, 151 F. 2d 240 (C.A. 3, 1945). These two cases are each distinguishable on their facts from the case at bar.

Petitioner asserts on the slender basis of the above two cases that there exists a conflict of decision between Circuits. Petitioner ignores the fact that the overwhelming weight of authority is in accordance with a restricted application of the Civil Rights Acts, and that the Circuit Courts of Appeal have repeatedly held that defendants similarly situated to the defendants in the case at bar are immune from any liability to the Plaintiff under the Civil Rights Acts.

Thus it has been repeatedly held that a municipal corporation, such as the City of Aurora is immune from any liability to an individual plaintiff under the Civil Rights Acts. *Ciuska* v. *City of Mansfield*, 250 F. 2d 701; *Charlton* v. *City of Hialeah*, 188 F. 2d 421; *Cobb* v. *City of Malden*, 202 F. 2d 701; *Agnew* v. *City of Compton*, 239 F. 2d 226.

As legislators and individuals in which capacities they were sued, the defendant City Commissioners Boucon, Konrad, Wyeth and Robertson are also immune from the suit under the Civil Rights Acts under a long line of decisional

law. *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S. Ct. 783; *Nelson* v. *Knox*, 256 F. 2d 312, 315; *Ortega* v. *Ragen*, 216 F. 2d 561 at p. 563.

Certainly none of the defendants as individuals are liable to the plaintiff, for the purpose of the Civil Rights Acts is to affect State conduct. *Collins* v. *Hardyman*, 341 U.S. 651; *U. S.* v. *Cruikshank*, 92 U.S.C. Sec. 47(3).

Finally the cases hold that the defendant Charles Darling as City Attorney, and the defendant Policemen, Curran, Stover, Stroud, Rukas, Pfiefer, Schuhow and Day are also immune from suit. *Stift* v. *Lynch*, 267 F. 2d 237, 239; *Eaton* v. *Bibb*, 217 F. 2d 446.

Against this weight of authority, the Petitioner tries to elicit a "conflict" between the Circuits on the basis of *Burt* and *Picking, supra*. One swallow does not make a summer. Two cases out of the many cited above do not make a conflict between the Circuits such as would justify this Court in considering in essence what it has already considered and decided in *Tenney* v. *Brandhove*, 341 U.S. 367.

The asserted differing holdings of the various Circuits—from which Petitioner would have this Court believe that the various Circuits are at war within themselves—involve Petitioner's blithe disregard of the differing fact and pleading situations that were before the courts concerned in the individual cases.

Because the Seventh Circuit in *Veach* v. *Moynahan*, 2[illegible] F. 2d 714, upheld one Complaint involving one fact situation and in another case affirmed a judgment for the victim of a cruel beating, *Wakat* v. *Harlib*, 253 F. 2d 59, does not permit the conclusion that all of the decisions of the Seventh Circuit must be uniform no matter what the fact situation or pleading before the Court was or might be.

The decisions granting official immunity in the case at bar

and in the overwhelming number of cases dealing with similar fact situations are based upon reasons founded in the thoughtful appreciation of many factors. Thus imposition of blanket liability, under the Civil Rights Acts would result in undue Federal supervision over State action, would ignore the traditional reasons for granting immunity to the type of officer involved, would finally ignore the basic historical purpose of the Civil Rights Acts. Note: "The Doctrine of Official Immunity under the Civil Rights Acts", 68 Harv. Law Review 1229-1231-2 (1955).

It was out of respect for these reasons as well as with reference to the well established precedent that the Seventh Circuit affirmed the judgment dismissing the Petitioner's Complaint.

II.

The Civil Rights Acts should not be extended to interfere with internal state subdivision government.

The Courts have repeatedly held that plaintiff *as an individual* would have no justifiable rights under the Civil Rights Acts against governmental bodies or officials similar to defendants in cases similar to or identical to the case at bar.

Nevertheless, Petitioner Egan here asserts that he has Federally protected rights "in his official capacity as Mayor of the City of Aurora" against other city officials which he does not have as an individual.

Petitioner thus seeks the protection of the Federal Civil Rights Acts, in conducting a political office of a municipal corporation of the State of Illinois, against the acts of *other* municipal officials!

For reasons going to the heart of our Federal system, no court has ever held that a Federal Statute can be invoked to protect one State political officer as against the

complaint that another State officer is impinging on a State given right. Petitioner's rights as the Mayor of the City of Aurora arise only from and under the laws of the State of Illinois, and are not entitled to protection of the Federal Civil Rights Acts. To apply the Civil Rights Acts would be to inject the Federal Government into relationships between State officials and would destroy the substance of the Federal system. In *Screws* v. *U. S.*, 325 U.S. 91 at pp. 108, 109, the Supreme Court stated:

> "We agree that when this statute is applied to the action of state officials, it should be construed so as to respect the proper balance between the States and the federal government in law enforcement. Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States. * * * The Fourteenth Amendment did not alter the basic relations between the States and the national government. * * * Our national government is one of delegated powers alone."

To the same effect are other cases decided by this Court and the various Circuit Courts of Appeals. *Davis* v. *Forman*, 251 F. 2d 421; *U. S.* v. *Ragen*, 237 F. 2d 953; *Ortega* v. *Ragen*, 216 F. 2d 561; *Geach* v. *Moynahan*, 207 F. 2d 714; *Miles* v. *Armstrong*, 207 F. 2d 234. Also see *Collins* v. *Hardyman*, 341 U.S. 651; *Snowden* v. *Hughes*, 321 U.S. 1; *Spampinato* v. *M. Breger and Co.*, 166 F. Supp. 33; *Smith* v. *Jennings*, 148 F. Supp. 641.

This principle is not new. It dates from *The Slaughter House Cases*, 16 Wall. 36 (1873). It is as valid now as it was then.

CONCLUSION

The decision of the Seventh Circuit is sound, well documented and in accordance with consistent authority and important principles vital to the maintenance of the Federal system. *Monroe* v. *Pape, et al.*, 272 F. 2d 365, in which this Court has granted a Writ of Certiorari is a case wholly different and distinct from the case at bar. As the Seventh Circuit pointed out, in *Monroe* v. *Pape* was involved "gross misconduct"; a series of unjustifiable batteries, unreasonable search and seizure, and long and inherently coercive unjustifiable secret detention. None of these are involved in the case at bar. The issues of *Monroe* are totally different from the issues in the case at bar. The case at bar was rightly decided and no purpose would be served by granting the Writ other than to further the Petitioner Egan's desire for publicity.

For the reasons stated above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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